

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE JABREE MARSHALL,

Defendant-Appellant.

UNPUBLISHED

December 15, 2011

No. 301571

Berrien Circuit Court

LC No. 2009-005695-FC

Before: MARKEY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to murder, MCL 750.83; possession of a firearm by a felon, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 23 years and 9 months to 40 years' imprisonment for assault with intent to murder, three years and two months to five years' imprisonment for possession of a firearm by a felon, and two years' imprisonment for felony firearm. Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

This case arises from an incident that occurred in the early morning hours of December 5, 2009, when Edward Porter, the victim, drove to a gas station in Benton Harbor, Michigan. When the victim arrived at the gas station, he recognized defendant because they both had been in a romantic relationship with the same woman, Tanita Crockett. Defendant was the father of Crockett's children; the victim was Crockett's boyfriend. When the victim left the store, defendant followed him and stopped him outside. Defendant accused the victim of hitting one of his children. The victim then heard a gunshot and saw a spark from in front of defendant. The victim testified that after he saw the spark, he saw a gun in defendant's hand.

According to the victim's testimony, he tried to run, but he was shot and fell to the ground. The victim was struck twice in the abdomen and once in the leg. Defendant ran up to the victim and said "I got you now. I got you" and "I'm going to kill your punk [expletive]."

Before the shooting, a witness parked her car right in front of the front door of the gas station where she testified that she saw two men walk out of the gas station. However, she was unable to identify the attacker and she did not see a gun.

Police investigators arrived at the gas station a few minutes after the shooting. They talked with the victim and asked him if he knew who shot him. The victim responded by saying defendant's name: "Andre Marshall." The police collected evidence from the scene of the shooting, including four shell casings found outside the gas station, a bullet found inside the gas station, and a bullet fragment found in a car at the scene. The police also recorded a copy of the gas station's surveillance video from the night of the shooting.

At trial, the victim, the victim's girlfriend, and Detective Wesley Smigielski with the Benton Harbor Police Department identified the victim and defendant in the gas station security video. Stuart Burritt, a forensic specialist in firearms identification for the Michigan State Police, testified that the four shell casings found at the scene were fired from the same firearm. There was some conflicting evidence as to the time at which the crime occurred, due mainly to the security camera placing an incorrect timestamp on the surveillance video. However, the officer in charge of the case and the female witness both testified that the crime occurred around the time the victim alleged he was shot. The defendant was convicted and sentenced as indicated above. This appeal then ensued.

On appeal, defendant first argues that there was insufficient evidence to support his three convictions. This Court reviews the sufficiency of the evidence in a jury trial *de novo*. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant first argues that there was insufficient evidence to support his conviction of assault with intent to murder. The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. MCL 750.83; *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). Identity is also an essential element of any crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Here, the victim testified that he heard a gunshot, saw a spark from in front of defendant, and saw a gun in defendant's hand. The victim identified defendant as his attacker to the police minutes after the shooting. At trial, the victim, his girlfriend, and Detective Smigielski identified the victim and defendant in a gas station surveillance video taken shortly before the shooting outside the gas station. The four bullet casings ejected from the same gun were found outside the gas station. This evidence is sufficient to prove both the identity and assault elements. In addition, the victim was shot twice in the abdomen and once in the leg. Defendant said to the victim "I got you now. I got you" and "I'm going to kill your punk" The number of times defendant shot the victim and defendant's statements are sufficient to prove the intent element. Finally, if the victim had died, defendant would have been guilty of murder under the facts above. Our review of the record presented leads us to conclude that there was sufficient evidence to allow a rational juror to find that the essential elements of assault with intent to commit murder were proven beyond a reasonable doubt.

Defendant next argues that there was insufficient evidence to support his conviction for possession of a firearm by a felon. The elements of possession of a firearm by a felon are: (1) defendant possessed a firearm, (2) defendant was previously convicted of a felony, and (3)

defendant's right to possess a firearm has not been restored. MCL 750.224f. Where the defendant fails to produce evidence that his right to possess a firearm has been restored, the prosecution is not required to prove the lack of restoration of firearm rights beyond a reasonable doubt. MCL 776.20; *People v Perkins*, 473 Mich 626, 640; 703 NW2d 448 (2005). Here, the victim testified that he saw a gun in defendant's hand and defendant stipulated to the fact that he was a convicted felon. Defendant did not produce evidence of the restoration of his right to possess a firearm. Under *Perkins*, that relieved the prosecution of the duty to prove that element. There was sufficient evidence to allow a rational juror to find that the essential elements of possession of a firearm by a felon were proven beyond a reasonable doubt.

Finally, defendant argues that there was insufficient evidence to support his conviction for felony-firearm. The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempt to commit a felony. MCL 750.227b; *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Here, the victim testified that he saw a gun in defendant's hand and there is sufficient evidence that defendant committed assault with intent to commit murder, a felony. There was sufficient evidence to allow a rational juror to find that the essential elements of felony-firearm were proven beyond a reasonable doubt.

Defendant also raises three issues in propria persona in his supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. None of these issues have merit.

Defendant first presents to this Court a statement that he was deprived of effective assistance of counsel. However, defendant fails to address his assistance of counsel claim in the text of his brief. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Where an appellant fails to address the merits of his assertion of error, the issue is abandoned. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Even if we were to consider defendant's claim of ineffective assistance of counsel, we would begin our analysis by stating: "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004), lv den 471 Mich 873 (2004). In this case, defendant has failed to direct this Court to any record evidence that could possibly lead this Court to conclude that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms. Having failed to meet the first prong of ineffective assistance of counsel, we need not consider the issue further. See, *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant next argues error related to the trial court's admission of the female witnesses' testimony and trial counsel's failure to object to it. The evidentiary issue was not preserved because defendant failed to object to her testimony. *People v Jones*, 468 Mich 345, 354-355; 662 NW2d 376 (2003). Our review is therefore for plain error, and we will ultimately reverse only where the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Duarte-Ramires, the female witness in this case, testified that she parked her car right in front of the front door of the gas station. She saw two men walk out of the gas station, but she

was unable to identify the attacker and she did not see a gun. Defendant has not established that plain error exists in the trial court's admission of Duarte-Ramires' testimony. Duarte-Ramires' statement that she saw two men walk out of the gas station is relevant because it supports the victim's testimony that defendant followed him out of the gas station. MRE 401. As such, the testimony was admissible. MRE 402. Also, Duarte-Ramires' testimony was not substantially outweighed by the danger of unfair prejudice. MRE 403. Her testimony that she could not identify defendant and that she did not see a gun was likely helpful to defendant concerning the issue of identity. Moreover, we note that where there are discrepancies in a witness' testimony, the inconsistencies go to the weight of the evidence, not to its admissibility. *People v Barrera*, 451 Mich 261, 289; 547 NW2d 280 (1996). The jury is the final judge of the credibility of a witness. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). To the extent defendant's question presented calls for this Court to review counsel's failure to object to the testimony, defendant has not demonstrated ineffective assistance of counsel. The evidence was relevant and admissible, and credibility is an issue for the jury. *Lemmon*, 456 Mich at 642. Counsel is not required to make frivolous objections. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). The trial court's admission of Duarte-Ramires' testimony was not plain error and counsel was not ineffective for failing to make a frivolous objection.

Finally, defendant argues that he was denied a fair trial when defendant moved the court to adjourn trial on July 28, 2010 and the trial court did not hear his motion. This issue is utterly without merit. Contrary to defendant's claim, defendant's motion to adjourn was heard by the trial court on August 2, 2010. Accordingly, no plain error occurred. *Carines*, 460 Mich at 763.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello